No. [redacted]
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JOHN T. FEY, Clerk

No. 5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

E. & F. KING & CO., INCORPORATED
Cross-claimant, Appellant

vs.

NUODEX PRODUCTS CO., INC.
Cross-defendant, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

RECORD APPENDIX TO BRIEF FOR THE APPELLANT

Submitted by

UPTON, SANDERS & UPTON
Attorneys for Appellant

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ADDITIONAL RELEVANT DOCKET ENTRIES

1956

June 22 Notice of appeal of defendant E. & F. King & Co., Incorporated, and certificate of service.

Statement of points to be relied upon by the appellant E. & F. King & Co., Incorporated, and certificate.

Statement of parts of record appellant proposes to print in the appendix of its brief, pursuant to Rule 24 of the Court of Appeals, and certificate.

MOTION OF NUODEX PRODUCTS CO., INC. TO DISMISS

CROSS-CLAIM OF E. & F. KING & CO., INCORPORATED

(Caption Omitted)

Now comes Nuodex Products Co., Inc., named as a defendant in the above-entitled action, and, while specifically reserving all of its rights under its Motion to Dismiss, heretofore filed herein, respectfully moves to dismiss the "Cross-Claim" of defendant E. & F. King & Co., Incorporated, on the following grounds:

(1) Nuodex Products Co., Inc., is not now, and never has been, subject to the jurisdiction of this Court in the proceedings in which said "Cross-Claim" was filed.

(2) Said "Cross-Claim" fails to state a cause upon which relief can be granted.

NUODEX PRODUCTS CO., INC.
By SUTTONWAY, JONES, HOLLIS & GODFREY
Its Attorneys

REQUESTS OF E. & F. KING & CO., INCORPORATED FOR FINDINGS AND RULINGS

(Caption Omitted)

E. & F. King & Co., Incorporated requests that the Court make the following findings and rulings:

* * *

23. In addition at all times Nuodex has packaged and sold Super Adit in bulk directly to its paint manufacturing customers which in turn have incorporated the product in their paints. These customers have totaled some 100 and they have sold and distributed such paints throughout the United States.

24. As such a paint manufacturer King purchased from Nuodex bulk Adit from 1950 to 1953 and Super Adit thereafter to September, 1954. King used Adit solely for repackaging and sale to Wilbur & Williams, a Massachusetts concern, which in turn placed its own label of "Fungus-Ban" on the bottles and sold and distributed the same all over the United States, including New Hampshire. King similarly repackaged and sold Super-Adit after 1953 to Wilbur & Williams and again the latter sold and distributed the product labeled "Fungus Ban" in the same territory. In addition King embodied Super-Adit in all its exterior paints, including greenhouse paints.

25. Up to September, 1954, King further continuously purchased antiskinning agents from Nuodex, which it used in most of its industrial finish paints, and also Nuodex driers, which it added to its industrial exterior and interior paints, and to its putty. King purchased all Nuodex products through Litter, the sales representative, and the latter at all times was not only aware of the use which King was making of Adit and Super-Adit, but also Nuodex driers and antiskinning agents. Nuodex employees were similarly acquainted with the use being made by King of these various Nuodex products.

26. From 1950 to 1954 King regularly sold paint and putty containing one or more Nuodex products to 50 or 60 New Hampshire customers, about 40 of whom regularly purchased from King paints containing Super-Adit. At all times subsequent to 1950 Litter was further aware that King was selling its paints and putty continuously and extensively in New Hampshire.

* * *

29. In its complaint the plaintiff alleges substantial damages as a result of the Nuodex Super-Adit embodied in the greenhouse paint sold by King to the plaintiff. The greenhouses in which the alleged damage occurred are situated in Madbury, New Hampshire, and accordingly it is agreed that if the alleged damage resulted it of course occurred in New Hampshire.

* * *

F. & F. KING & CO., INCORPORATED
By its attorneys
UPTON, SANDERS & UPTON
By JOHN H. SANDERS

MOTION OF F. & F. KING & CO., INC. TO AMEND AND SUPPLEMENT FINDINGS OF FACT

(Caption Omitted)

Now comes F. & F. King & Co., Incorporated and moves the Court to amend and supplement its findings of fact heretofore filed, in the following particulars:

1. Make the following additional findings of fact:

(a) At all times Nuodex has packaged and sold Super-Adit in bulk directly to its paint manufacturing customers which in turn have incorporated the product in their paints. These customers have totaled some 100 and they have sold and distributed such paints throughout the United States.

(b) As such a paint manufacturer King purchased from Nuodex bulk Adit from 1950 to 1953 and Super-Adit thereafter to September, 1954. King used Adit solely for repackaging and sale to Wilbur & Williams, a Massachusetts concern, which in turn placed its own label of "Fungus-Ban" on the bottles and sold and distributed the same all over the United States, including New Hampshire. King similarly repackaged and sold Super Adit after 1953 to Wilbur & Williams and again the latter sold and distributed the product labeled "Fungus-Ban" in the same territory. In addition King embodied Super-Adit in all its exterior paints, including greenhouse paints.

(c) Up to September, 1954, King further continuously purchased anti-skinning agents from Nuodex, which it used in most of its industrial finish paints, and also Nuodex driers, which it added to its industrial exterior and interior paints, and to its putty. King purchased all Nuodex products through Litter, the sales representative, and the latter at all times was not only aware of the use which King was making of Adit and Super-Adit, but also Nuodex driers and antiskinning agents. Nuodex employees were similarly acquainted with the use being made by King of these various Nuodex products.

(d) From 1950 to 1954 King regularly sold paint and putty containing one or more Nuodex products to 50 or 60 New Hampshire customers, about 40 of whom regularly purchased from King paints containing Super Adit. At all times subsequent to 1950 Litter was further aware that King was selling its paints and putty continuously and extensively in New Hampshire.

(e) In its complaint the plaintiff alleges substantial damages as a result of the Nuodex Super-Adit embodied in the greenhouse paint sold by King to the plaintiff. The greenhouses in which the alleged damage occurred are situated in Madbury, New Hampshire, and accordingly it is agreed that if the alleged damage resulted it of course occurred in New Hampshire.

E. & F. KING
By its attorneys
UPTON, SANDERS & UPTON
By JOHN H. SANDERS

ANSWER OF DEFENDANT NUODEX PRODUCTS CO., INC. TO MOTION OF DEFENDANT KING COMPANY TO AMEND AND SUPPLEMENT FINDINGS OF FACT

(Caption Omitted)

COMES now Defendant Nuodex Products Co., Inc. and in opposition to the above cited motion of defendant King Company Inc. respectfully says:

1. This Honorable Court is without jurisdiction to consider the above cited motion which was filed on April 26, 1956 inasmuch as prior to its filing plaintiff Elliott and Sons, Inc. on April 25, 1956 had filed notice of appeal of the Order complained of to the First Circuit Court of Appeals, thereby causing the jurisdiction of that Court to attach to this action and the jurisdiction of this Court to be withdrawn from it.
2. The supplemental findings sought by the movant do not concern necessary facts essential to the Court's order and they are therefore improper.
3. The requested supplemental findings are unsupported by the evidence and in any case they are irrelevant and immaterial to any issue which was before the Court upon Defendant Nuodex' motion to quash service and dismiss the action as to it, and the findings sought are therefore improper.

WHEREFORE, Defendant Nuodex Products Co., Inc. respectfully prays the Court that Defendant King Company's Motion to Amend and Supplement Findings of Fact be Denied.

NUODEX PRODUCTS CO., INC.
By: SULLOWAY, JONES, HOLLIS & GODFREY

ORDER OF MAY 31, 1956

The motion of defendant E. & E. King & Co., Incorporated, to amend and supplement findings of fact is denied.

ALOYSIUS J. CONNOR
United States District Judge

NUODEX EXHIBIT D

This is to certify that according to the records of the Commissioner of Agriculture there were registered with this office under the provisions of the economic poisons law of the State of New Hampshire (Laws of 1949, c. 311, eff. January 1, 1950, 4 R.S.A., c. 438) by or in behalf of Nuodex Products Company, Inc. the following products from time to time:

January 12, 1950	Nuodex-Copper 8%
April 7, 1950	Nuodex 321 SS
May 11, 1950	Ad-It
January 10, 1951	Nuodex 321 SS
January 10, 1951	Ad-It
March 1, 1951	Ad-It
February 4, 1952	Ad-It — Retail
February 4, 1952	Ad-It — Industrial
February 4, 1952	Nuodex 84
January 22, 1953	Super Ad-It
March 23, 1953	Nuodex 84
June 18, 1953	Super Ad-It — Retail
August 20, 1953	Nuodex 100-WD
January 5, 1954	Nuodex 100-WP
January 5, 1954	Nuodex Super Ad-It — Industrial
January 5, 1954	Nuodex Super Ad-It — Retail
July 29, 1954	Nuodex 84
January 13, 1955	Super Ad-It — Industrial
January 13, 1955	Super Ad-It — Retail
January 13, 1955	Nuodex 100-WP
October 11, 1955	Nuodex 84

s GEORGE H. LARAMIE
Control Supervisor
N. H. Dept. of Agriculture

Civ. 1465
Nuodex D
Oct. 28, 1955